United Nations

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 933

Case No. 1030: BALKIS

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza, Vice-President; Mr. Kevin Haugh;

Whereas at the request of Mohammed Balkis, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended to 31 July 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 24 July 1998, the Applicant filed an application requesting the Tribunal:

"1. To rescind the administrative decision of 6 May 1996 by the Deputy Chief, Personnel Services Division, that I would forfeit my termination indemnity as a result of my transfer to ICAO [International Civil Aviation Organization] (...) and to order the Commissioner-General of UNRWA to pay me termination indemnity for the period of my service in UNRWA as an Area staff member within 30 days of the

judgement by the Tribunal. The amount of indemnity should be calculated in accordance with Area staff rule 109.9.3 (A) of UNRWA (...);

2. To order the Commissioner-General of UNRWA to pay me a yearly interest of 10% on the indemnity amount from the date of my separation from UNRWA as an Area staff member, i.e. 12 January 1996, until the date of payment of that amount;

3. To order the Commissioner-General of UNRWA to pay me an amount of US$ 4,000.00 in compensation for legal consultation fees, telecommunications and postal services expenses;

4. To order the Commissioner-General of UNRWA to pay me an amount to be decided by the Tribunal for discrimination, as there have been a number of other UNRWA staff members who had received termination indemnity when their Area staff permanent contracts were terminated and offered jobs in the International staff category;

5. To order the Commissioner-General of UNRWA to pay me an amount of compensation, to be decided by the Tribunal, for the emotional and psychological damage this case has caused me, in addition to a compensation on the time and effort that I had to invest in this appeal over the last two years."

Whereas the Respondent filed his answer on 25 February 1999;

Whereas the Applicant filed written observations on 19 April 1999;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 9 November 1990, on a fixed term appointment as a Senior Clerk, in the Budget Division at UNRWA Headquarters, Vienna. Effective 1 April 1992, the Applicant accepted a temporary-indefinite appointment as an Area staff member in the post of Assistant Budget Officer (Projects) also at UNRWA Headquarters in Vienna.

On 27 October 1994, the Applicant was informed that he was declared "provisionally redundant with effect from 1 November 1994" as a consequence of the relocation of UNRWA Headquarters from Vienna to Gaza.

Between 13 February 1995 and 12 January 1996, the Applicant was placed on special leave without pay to accommodate his secondment to the United Nations Industrial Development Organization. On 19 October 1995, the Deputy Director of Administration and Human Resources, UNRWA, wrote a letter to the Applicant which stated, *inter alia*, as follows:

> "...
>
> ... should you wish to return to your post, you will be offered the opportunity of a fixed-term appointment as Assistant Budget Officer (Projects), P-2, subject to your relocating to Gaza and serving there for at least one year.
>
> ...
>
> ... you are asked to notify [the] Chief, Personnel Services Division ... which of the following options, which will be subject to the condition expressed in the final paragraph of this letter, you choose:
>
> (A) International appointment as Assistant Budget Officer (Projects), P-2, for a fixed term to end 30 June 1997, or one year after relocation to Gaza, whichever is the later ...
>
> (B) Following your return form special leave without pay, continued service in your post of Assistant Budget Officer (Projects) Grade 14 until its relocation to Gaza and assignment thereafter for one year to Gaza at the same grade and salary scale with payment of the appropriate mission allowance ...
>
> (C) [N]either of the above: termination on redundancy grounds on relocation of your present post to Gaza ...
>
> ...
>
> If you select option (A) or option (B), the notice of provisional redundancy already served on you will no longer apply until the expiry of your International appointment or mission assignment. In that event, you would receive a termination indemnity on separating from the Agency only if (a) your appointment was terminated before the completion of your appointment or mission assignment or (b)

you were not offered or did not accept a further appointment/assignment with UNRWA on its completion."

On 25 October 1995, the Applicant wrote to the Chief, Personnel Services Division, UNRWA, opting for appointment to the International post of Assistant Budget Officer (Projects), P-2.

By letter dated 1 December 1995 from the Director of Administration and Human Resources, UNRWA, the Applicant was offered appointment to the post, effective 13 January 1996. This letter provided, *inter alia*, that the appointment was conditional on him relocating to Gaza and serving there for at least one year. The appointment was for a fixed-term expiring on 30 June 1997 or one year after the relocation of his post to Gaza, whichever was later. The letter also stated, *inter alia*:

"...

As provided in paragraph 3 of Area Staff Circular 5/95, dated 6 April 1995, you will receive a termination indemnity calculated on the basis of your years of service as an Area staff member but based on the rate of salary applicable at the time of its payment if and when you are terminated from the International post on redundancy grounds or, in the event of voluntary separation at the end of the fixed-term appointment but not during it.

...

By accepting this offer of appointment you will no longer be regarded as provisionally redundant.

This offer of appointment is conditional on your acceptance of the above terms.

..."

On 11 December 1995, the Applicant signed the offer of appointment indicating "I hereby accept the above terms". On the same date, he also signed the letter of appointment consistent with the offer, effective 13 January 1996.

On 24 April 1996, the Chief, Personnel Branch, International Civil Aviation Organization (ICAO), wrote to the Director of Administration and Human Resources, UNRWA, advising him that the Secretary-General, ICAO, had decided to "appoint [the Applicant to the post of ... Finance Officer, Finance Branch, ICAO, Montreal ... on a temporary basis for a period of one year." ICAO sought UNRWA's agreement to the Applicant's release on transfer in accordance with the terms of the Inter-Agency Agreement Concerning Transfer, Secondment or Loan of Staff.

On 6 May 1996, the Deputy Chief, Personnel Services Division, UNRWA, wrote to the Applicant, confirming the Applicant's agreement "to be released on Inter-Agency Transfer to ICAO, Montreal, effective 1 July 1996." He further stated:

> "I also confirm that you are fully aware that, as a consequence of this transfer, you will forfeit payment of termination indemnity in respect of your previous Area staff appointment with the Agency. ..."

On 15 May 1996, the Officer-in-Charge of the Department of Administration and Human Resources, UNRWA, advised ICAO that UNRWA agreed to release the Applicant on Inter-Agency Transfer, effective 19 August 1996.

On 27 June 1996, the Applicant wrote to the Director of Administration and Human Resources, UNRWA, referring to the 6 May letter from the Deputy Chief, Personnel Services Division, UNRWA, and requested him to reconsider the Administration's decision "to deny me the right to receive termination indemnity as a result of my transfer to the International Civil Aviation Organization (...)". He stated, *inter alia*:

> "...
>
> 4. The offer I received from UNRWA to relocate to Gaza has neither invalidated the redundancy notice nor has it compensated me for my lost temporary indefinite contract. In fact, it has merely postponed my redundancy and the payment of my termination indemnity until the end of the fixed-term appointment in Gaza.

5. The payment of termination indemnity is a right which I, like others, have acquired during my service as an Area staff member. The Agency should therefore have paid me the amount due to me when I transferred to an International post in January 1996, i.e. the Administration had no legal right to withhold my separation entitlements.

6. Furthermore, there are many cases where Area staff members were transferred to International posts within UNRWA and nevertheless received termination indemnities. I am simply requesting equal treatment.

7. I believe that my transfer to ICAO is in line with UNRWA's policy of creating employment in Gaza. Leaving a vacant post behind me in UNRWA HQ(G) is beneficial for both myself and the objectives of the Agency.

..."

On 4 October 1996, the Applicant wrote to the Director of Administration and Human Resources, UNRWA, informing him that he had not receive a reply to his letter dated 27 June 1996.

On 14 October 1996, the Area Personnel Officer, UNRWA, informed the Applicant that the Director of Administration and Human Resources, UNRWA, had responded to his letter of 27 June 1996, on 22 July 1996. He attached copy of the letter. The said letter stated as follows:

"...

When you were appointed to an International post effective 13 January 1996, one of the conditions of employment set out in the letter from my predecessor dated 1 December 1995, which you signed as accepting, provided as follows:

> 'As provided in paragraph 3 of Area staff circular 5/95, dated 6 April 1995, you will receive a termination indemnity calculated on the basis of your years of service as an Area staff member but based on the rate of salary applicable at the time of its payment if and when you are terminated from the International post on redundancy grounds or, in the event of voluntary separation at the end of the fixed-term appointment but not during it'.

The letter also states that by accepting this offer of employment, you will no longer be regarded as provisionally redundant.

The above condition provides that you will receive a termination indemnity in the event of voluntary separation at the end of your fixed-term appointment, 'but not during it'. Therefore, under the terms of your contract of employment with the Agency you are not entitled to a payment [of] a termination indemnity. As you will recall, this was explained to you by my predecessor in May of this year, and at that time you indicated full understanding of the situation, which was again explained in the letter of 6 May from the Deputy Chief, Personnel Services Division.

Having reviewed the circumstances of your case, I conclude that you have no entitlement to termination indemnity. Therefore, I regret that I cannot accede to your request for payment."

On 4 November 1996, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB submitted its report on 1 December 1997. Its evaluation, judgement, recommendation and dissenting opinion read as follows:

"**III. EVALUATION AND JUDGEMENT**

27. In its deliberations the Board examined all documents cited before it including the Appellant's personal file and came out with the following:

(a) By reference to the appeal the Board noted the Appellant's contention that he is entitled for termination indemnity.

(b) By reference to the Administration's reply the Board noted the Administration's contention that the Appellant has failed to discharge the onus on him under Area staff rule 111.1, paragraph 4.

(c) The Board by majority vote noted that the Appellant had a contractual agreement which he signed without any objection to its contents. Furthermore, the Appellant did not complete the one year qualifying service for receiving the termination indemnity, i.e. had he not voluntary separated from the Agency prior to the end of that year he would upon separation from the service of the Agency have received a termination indemnity.

(d) In this context, the Board by majority vote is of the opinion that the Administration has acted within the framework of standing Rules and Regulations.

IV. RECOMMENDATION

28. In view of the foregoing, and without prejudice to any further oral or written submissions to any party, the Appellant may deem pertinent, the Board by majority vote makes its recommendation to uphold the Administration's decision appealed against and that the cases be dismissed.

DISSENTING OPINION ...

I disagree with the Board in that there was a precedent, the case of Mr. Al-Omari, in which the Commissioner-General agrees that the rules which govern these situations are absent, I am of the opinion that since there are no rules governing these situations, it is unfair that some staff members should receive their termination indemnities and some shouldn't.

I am also of the opinion that the contractual agreement that the Appellant signed with the Administration, was accepted by the Appellant because he had no other choice but to accept it with its terms and conditions or stay with no work.

As for the Appellant resigning before the one year condition to which he receives his termination indemnity after he completes this one year, the Appellant had to resign to accept an offer in the International Civil Aviation Organization, ..., to insure his future which UNRWA did not by giving him only a one year contract.

By reference to Area staff circular 5/95, paragraph 3/b, the Appellant eventually will be eligible for the termination indemnity because he is still a United Nations staff member.

I recommend that the Administration's decision appealed against be reviewed."

On 31 December 1997, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him, *inter alia*, as follows:

"...

The Board (with one member dissenting) found that your release from the Agency was subject to a voluntary contractual agreement, signed without any objections to its contents. Furthermore, the Joint Appeals Board concluded that you had not completed the one year qualifying service for receiving the termination indemnity. Therefore, it recommended that your appeal be dismissed. (The dissenting member considered that it was unfair that some staff members should receive their termination indemnities while others would not and, that therefore, a termination indemnity should have been paid).

I have accepted the Board's majority recommendation and accordingly I dismiss your appeal.

..."

On 24 July 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The termination indemnity that resulted from terminating the Applicant's permanent area staff appointment should have been paid to him when UNRWA ended that appointment.

2. The Applicant had an acquired right to a termination indemnity for his services as an Area staff member in accordance with the Area Staff Regulations and Rules. His acceptance of an international appointment should not have been made conditional on his waiver of this right. Similarly, he should not have lost this right as a consequence of his transfer to ICAO.

3. His letter of appointment as an international staff member did not state specifically that the waiver of his right to receive a termination indemnity was a condition applicable to obtaining his new appointment. The attached letter offering the appointment dated 1 December 1995 was not a part of his letter of appointment. Even if the 1 December letter had been part of his letter of appointment, its interpretation as a waiver of his claim to a termination indemnity and renunciation of an acquired right lacked validity.

Whereas the Respondent's principal contention is:

The Applicant lost any entitlement to payment of a termination indemnity by reason of his transfer before the completion of his international contract.

The Tribunal, having deliberated from 5 to 15 November 1999, now pronounces the following judgement:

I. The Applicant's case, with the legal questions it raises, is not without analogy to other cases on which the Tribunal has been called upon to take a decision. More specifically, and as the Respondent notes, there are similarities between the case which gave rise to Judgement No. 886, *Al-Omari* and the one arising from the Applicant's request. The present case is more complex than the *Al-Omari* case.

Like the Applicant in the *Al-Omari* case, Mr. Balkis held an Area staff appointment with UNRWA for a certain time (from 1990 to 1994), whereas upon the relocation of that Agency's headquarters to Gaza, a proposal was made to the Applicant to receive an international appointment in this new posting. Nevertheless, while the Applicant *Al-Omari* was offered a permanent international appointment, the Applicant Balkis was only offered an international appointment for one year, with no promises for the future at the end of that period.

II. In accordance with the Tribunal's jurisprudence in the *Al-Omari* case, a staff member who, at the end of a fixed-term Area staff appointment, obtains an international appointment, is not entitled to a termination indemnity at the end of his fixed-term Area staff appointment. There is no separation between the two successive posts and hence no termination which would warrant entitlement to an indemnity. It is only at the end of his fixed-term international appointment that the staff member can, if he is terminated, receive termination indemnities

due in respect of his Area staff appointment and his international appointment. This jurisprudence is fully applicable to the Applicant with regard to his obtaining an international appointment.

III. Despite having accepted an international appointment in Gaza for one year, the Applicant voluntarily terminated this appointment after the first three months by accepting the offer which was made to him to become a staff member of the International Civil Aviation Organization in Montreal. The Applicant, who thus resigned permanently from UNRWA, is asking that the indemnity provided for in staff rule 109.9 be paid to him for his services as an Area staff member of UNRWA from 1990 to 1994.

It appears, however, that at the time of his appointment as an international staff member, the Applicant was informed that, in accordance with the provisions of Area staff circular 5/95 of 6 April 1995, he would receive a termination indemnity for his services as an Area staff member, but only at the end of his fixed-term international appointment and not during it. The letter sent to him on 1 December 1995 stated explicitly that:

> "As provided in paragraph 3 of Area staff circular 5/95, dated 6 April 1995, you will receive a termination indemnity calculated on the basis of your years of service as an Area staff member but based on the rate of salary applicable at the time of its payment if and when you are terminated from the International post on redundancy grounds or, in the event of voluntary separation at the end of the fixed-term appointment but not during it."

This text prohibited the payment of a termination indemnity to the Applicant if he voluntarily ended his employment before its termination, as was provided for at the time of his appointment.

The Tribunal considers, therefore, that the Applicant, having accepted the conditions which were put to him at the time of his appointment to Gaza, has voluntarily forfeited his right to receive a termination indemnity for his services with UNRWA.

IV. For these reasons, the Tribunal rejects the application.

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Vice-President

Kevin HAUGH
Member

New York, 15 November 1999

Maritza STRUYVENBERG
Executive Secretary